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SUPERIOR COURT OF STATE OF ARIZONA

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COUNTY OF YAVAPAI

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14 STATE OF ARIZONA,

15 Plaintiff,

16 vs.

17 JAMES ARTHUR RAY,

18 Defendant.

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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2011 JUL 26 PM 3:15/

SANDRA K. HARKHAM, CLERK

BY: Kelly Gresham

CASE NO. V1300CR201080049

Hon. Warren Darrow

DIVISION PTB

**DEFENDANT JAMES ARTHUR RAY'S
REPLY IN SUPPORT OF MOTION FOR
NEW TRIAL PURSUANT TO ARIZ. R.
CRIM. P. 24.1**

1 **I. INTRODUCTION**

2 There is little dispute that the State committed serious misconduct throughout Mr. Ray's
3 trial, and that the repeated misconduct permeated the trial atmosphere. Mr. Ray's Motion for
4 New Trial sets out a minimum of *ten* categories of misconduct that the State committed, many of
5 which involve undisputed error. *See* Defendant's Motion for New Trial at 3; State's Response at
6 3 ("[T]he State's inadvertent errors were made over the course of a lengthy and contentious
7 proceeding . . ."). This Court has expressly acknowledged that the State's improper behavior
8 "framed" the case and "tends to color how the case has proceeded." *See* Defendant's Motion for
9 New Trial at 24 (citing Trial Transcript, 6/16/11, at 30:19–24).

10 The prosecution's Response concedes many of the errors set out in the Defense's opening
11 motion and fails to explain the others. The State's argument, it appears, is that the errors do not
12 necessitate a new trial because the Defense has not proved that the State acted with a "sinister
13 motive"; because Mr. Ray "has failed to show he was prejudiced" by various errors; because Mr.
14 Ray "has failed to show that the verdict would have been different" had errors not occurred; and
15 because the trial was "lengthy and contentious." State's Response at 2, 3, 15, 19. Each of these
16 arguments is misplaced. As explained below, it is the State, not the Defense, that must prove
17 prosecutorial error is harmless beyond a reasonable doubt. *See State v. Bible*, 175 Ariz. 549, 588
18 (1993). And both the trial's length and the prosecutor's mental state are irrelevant. The propriety
19 of a new trial following prosecutorial misconduct is not a controversial point of law. In many
20 other Arizona cases and recent high-profile federal prosecutions, a single act of prosecutorial
21 wrongdoing has resulted in a new trial. The record in this case makes clear that prosecutorial
22 misconduct permeated the proceedings and impeded basic fairness at every turn. This Court
23 should order a new trial at this time.

24 **II. ARGUMENT**

25 **A. The State Bears the Burden of Proving the Errors Were Harmless**

26 The parties agree that "the harmless error rule is applicable" to all of the grounds that may
27 form the basis for a new-trial motion under Rule 24, including prosecutorial misconduct. *See*
28 State's Response at 3; Ariz. R. Crim. P. 24.1, cmt. Under this rule, "[t]he State has the burden of

1 convincing [the court] that error is harmless.” *State v. Bible*, 175 Ariz. 549, 588 (1993) (citing
2 *Chapman v. California*, 386 U.S. 18, 24–26 (1967)). The State’s burden is demanding: it must
3 prove “*beyond a reasonable doubt* that the error had *no* influence on the jury’s judgment.” *Id.*
4 (emphasis added); *see also State v. Krone*, 182 Ariz. 319, 321 (1995); *State v. McVay*, 127 Ariz.
5 450, 453, (1980) (“If it can be said that the error, beyond a reasonable doubt, had no influence on
6 the verdict of the jury, then we will not reverse.”).

7 Here, the State repeatedly asserts that *Mr. Ray* has failed to show that the State’s various
8 errors affected the verdict or caused him prejudice. It is the State, not Mr. Ray, that bears this
9 burden. Many of the prosecutor’s errors occurred in front of the jury. The State has failed to
10 show—much less prove beyond a reasonable doubt—that the cumulative effect of these errors
11 “had *no* influence on the jury.” *McVay*, 127 Ariz. at 453 (emphasis added).

12 **B. A New Trial Is the Appropriate Result in This Case**

13 The State argues that new trials are granted only in “very extreme cases.” State’s
14 Response at 3. That is wrong. Rule 24 provides that a court “may grant a new trial” based on
15 prosecutorial misconduct, Ariz. R. Crim. P. 24.1(c), and courts have ordered new trials for
16 conduct far less egregious and pervasive than the State’s conduct in Mr. Ray’s case. For
17 example, in *State v. Leon*, 190 Ariz. 159 (1997), the prosecutor’s opening statements “attempted
18 to place the prestige of the government behind his case.” *Id.* at 163. The prosecutor’s closing
19 arguments “implied that there had been past criminal activity involving one or more of the
20 defendants.” *Id.* The trial court tried to correct the latter error by giving curative instructions to
21 the jury. *Id.* at 161. Based on these two instances of misconduct and despite the curative
22 instructions, the Arizona Supreme Court ordered a new trial: “We are simply unable to say
23 beyond a reasonable doubt that the prosecutor’s misconduct did not contribute to the verdict
24 against defendant.” *Id.* at 163.

25 In *State v. Bailey*, 132 Ariz. 472 (1982), the Arizona Supreme Court ordered a new trial
26 for three instances of prosecutorial misconduct. The prosecutor insinuated that an expert witness
27 was unethical and incompetent, spoke about matters not in evidence, and implied that the
28 defendant had engaged in prior bad acts. *Id.* at 477–79. The court concluded that “[u]nder the

1 circumstances, it cannot be said that the improper and unfounded attempt to discredit [the expert
2 witness] did not influence the jury. From the record we have before us, we believe that the
3 remarks of the county attorney were unsupported and when considered with the other examples of
4 misconduct, constituted reversible error.” *Id.* at 479.

5 In addition, Arizona courts have granted new trials for single instances of misconduct. In
6 *State v. Enriquez*, 102 Ariz. 402 (1967), the prosecutor simply asked the defendant whether he
7 had ever worn a mask in Scottsdale. The Arizona Supreme Court ordered a new trial because this
8 question may have suggested the defendant had committed a prior bad act. *Id.* at 405. And in
9 *State v. Harrington*, 27 Ariz. App. 663 (App. 1976), the prosecutor noted that the victim was a
10 violent person. *Id.* at 666. The prosecutor then indirectly attacked the defendant by saying,
11 “[b]irds of a feather flock together.” *Id.* The court granted a new trial. *Id.*; *see also State v.*
12 *Anderson*, 110 Ariz. 238, 239 (1973) (ordering a new trial because the prosecutor indirectly called
13 attention to the defendant’s pretrial silence); *State v. Fowler*, 101 Ariz. 561, 564 (1967) (ordering
14 a new trial because of a single *Brady* violation).

15 Courts sometimes try to correct prosecutorial error through jury instructions, but such
16 instructions can still leave doubt as to whether error influenced the jury. In *State v. Martinez*, 175
17 Ariz. 114 (App. 1993), the prosecutor referred to an Arizona Supreme Court opinion that was not
18 in evidence to call into question the defendant’s credibility based on his prior felony conviction.
19 *Id.* at 119. The trial court gave an instruction regarding the credibility of a defendant who has a
20 prior felony conviction, but the intermediate court ordered a new trial because the prosecutor’s
21 reference “may [have] influence[d] the verdict.” *Id.* at 120. In *Leon*, the prosecutor made
22 reference in his closing argument to a police report that was not in evidence. *See* 190 Ariz. at
23 161. The trial court gave a cautionary instruction, telling the jury that “the lawyer’s comments
24 ‘should not be construde [sic] by you that there is other evidence out there which has not been
25 received which is evidence of guilt. The only evidence that you’re to consider is that which has
26 been admitted and nothing else.”” *Id.* The Arizona Supreme Court nonetheless reversed and
27 ordered a new trial, explaining that “we cannot be reasonably certain that this instruction was
28 sufficient to eliminate any damage.” *Id.* at 163.

1 There is an even greater risk that the State's misconduct influenced the verdict in Mr.
2 Ray's case. The opening motion identifies ten categories of misconduct, and many of the State's
3 errors—including improper burden shifting, vouching, misuse of evidence, and misstatements of
4 facts—occurred in closing arguments. Such errors are a particular concern to Arizona courts.
5 *See, e.g., Leon*, 190 Ariz. at 163 (vouching and misuse of evidence); *Martinez*, 175 Ariz. at 119
6 (misuse of evidence); *Harrington*, 27 Ariz. App. at 666 (noting that errors in closing argument
7 may “foreclose[] an opportunity to militate the effect of the remark upon the jury.”). The State
8 urges this Court to ignore errors because of the Court's curative instructions, but such instructions
9 did not attend every error, and do not preclude the possibility that misconduct “influence[d] the
10 verdict.” *Martinez*, 175 Ariz. at 120.

11 **C. The State Cannot Avoid a New Trial Because of the Length of the Trial or**
12 **Lack of Evil Intent**

13 Finally, in urging this Court to deny the motion for new trial, the State makes various
14 references to the fact that the trial lasted many months, and argues that the State's errors were
15 committed without “sinister motive” or “evil intent.” These assertions have no bearing on the
16 Rule 24 motion. The touchstone for the grant of a new trial based on prosecutorial misconduct is
17 the fairness of the defendant's trial. *See, e.g., State v. Hughes*, 193 Ariz. 72, 80 (1998) (“In
18 reviewing prosecutorial misconduct, we focus on whether it affected the proceedings in such a
19 way as to deny the defendant a fair trial.”). In this analysis, it is of no moment that the trial was
20 lengthy—and that argument is particularly misplaced given that it was the State that chose to
21 present a very long case, over the Defense's repeated objections that the State's evidence was
22 cumulative or irrelevant. Similarly, it is no answer that the prosecutor did or did not behave with
23 a “unethical or sinister motive.” State's Response at 2. The relevant inquiry, again, is whether
24 the prosecutor's conduct rendered the trial unfair. *Hughes*, 193 Ariz. at 79; *State v. Roque*, 213
25 Ariz. 193, 230 (2006) (stating that courts should grant a new trial if “the cumulative effect of the
26 misconduct . . . permeated the entire atmosphere of the trial with unfairness . . .”).¹ It did.

27 ¹ Even the higher standard that must be met to bar retrial pursuant to the Double Jeopardy Clause does not
28 require a sinister motive. Retrial is barred if the prosecutor's misconduct “amounts to intentional conduct
which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose

1 **III. CONCLUSION**

2 Time and again, the Arizona Supreme Court has emphasized that “the responsibilities of a
3 prosecutor go beyond the duty to convict defendants,” and that “[p]ursuant to its role of ‘minister
4 of justice,’ the prosecution has a duty to see that defendants receive a fair trial.” *Hughes*, 193
5 Ariz. at 80; *see also State v. Cornell*, 179 Ariz. 314, 331 (1994) (“[A] prosecutor has the
6 responsibility of a minister of justice and not simply that of an advocate.”). Those duties were
7 breached in this case—and not in isolated fashion. As set forth in the opening motion, the
8 prosecutor’s misconduct was pervasive and permeated the atmosphere of Mr. Ray’s trial. To
9 fulfill the commands of Due Process and the Sixth Amendment’s fair-trial guarantee, the Court
10 should grant a new trial at this time.

11
12 DATED: July 21, 2011

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17 By: [Signature]
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27 with indifference to a significant resulting danger of mistrial or reversal.” *Pool v. Superior Court*, 139 Ariz. 98,
28 109 (Ariz. 1984). Although not necessary to resolution of this motion, that standard is met here.